
SUBMISSION BY THE
NEW ZEALAND BUSINESS ROUNDTABLE

REVIEW OF THE HOLIDAYS ACT 1981

A Response to the Consultation Paper:
Options for Flexibility

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1.0 Introduction

1.1 This submission is made on behalf of the New Zealand Business Roundtable (NZBR), an organisation of chief executives of major New Zealand businesses. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 The NZBR welcomes the review of holidays legislation. The current legislation is a source of inconvenience and cost to employers and employees. There have been no fewer than 25 cases concerning the Holidays Act reported in the *Employment Reports of New Zealand* (where only the most significant cases are reported) since 1991, four of them in the Court of Appeal.

1.3 This review is intended to go back to first principles, and the letter of 11 November 1997 from the Minister of Labour draws a contrast with previous reviews which were of a fine-tuning nature. It is hard to see, however, that the proposals made are anything more than further fine-tuning. Indeed on one issue, the question of payment for working on public holidays, the proposals simply return to the pre-1991 position.

1.4 As background, it should be borne in mind that throughout this century working hours have reduced and time off, in one form or another, has increased. This observation includes not only the shortening of the working week but also increased amounts of time spent in education and training while young and earlier retirement. It has been estimated that in the last hundred years the time devoted to non-work activities by the average American male head of household has increased from 10.5 hours per week to 40 hours, while time at work has fallen from 61.6 hours to 33.6. The trend has been similar in New Zealand. This reflects the increasing productivity of the work force and the increasing value placed on leisure as incomes rise and material needs are met. It has little to do with legislation. In fact, throughout the period covered by the figures quoted, the United States has had no legislated holiday requirements at all.

2.0 WHY HAVE HOLIDAYS LEGISLATION AT ALL?

2.1 The first question to be decided is whether the government should concern itself with holidays at all. The model of 'work' that seems to motivate holidays legislation is that employees are engaged in basically manual labour which cannot be carried on once they leave the workplace. But increasing proportions of the population:

- are self-employed and not covered by holidays legislation at all;
- are salary earners rather than wage earners. Increasingly, they have their work defined by outputs rather than inputs and are left some discretion about how and when to achieve their outputs; and
- work with their brains rather than their hands. For many people the idea of set amounts of holidays is largely meaningless, as they may well continue to think, talk and write about work-related matters while formally on holiday.

2.2 These forms of flexibility in working arrangements and the greater diversity of lifestyles in today's society mean that holidays legislation is becoming increasingly irrelevant. Whatever benefits it produces are declining while the costs to employers who have to operate under it either stay steady (since employers must invest in understanding the provisions as long as they have employees covered by them) or increase as such rigidities become more of an obstacle to succeeding in global competition. Frequently New Zealand holiday arrangements do not line up with the needs of suppliers and customers in other countries. Business practices have changed enormously whereas holidays legislation has not changed significantly since it was enacted around 50 years ago.

2.3 Even for manual workers, leave is just one part of an employee's remuneration package. It is not clear that the government should concern itself with the details of the way that the rewards of employment are distributed. The trend in both legislation and workplace practice has been to allow the parties to an employment contract - particularly employees - to decide this for themselves.

2.4 Two main arguments are made for government intervention in labour market decisions about holidays. These are that employees are in an unequal bargaining position and hence require to be protected, and that holidays are required for health and safety reasons.

2.5 The NZM has addressed the unequal bargaining position argument in a number of contexts. It is a fallacy. Previous labour law was based on this fallacy. The Employment Contracts Act rejected it. Employees are not in competition with employers but with each other and with the unemployed. Employers, likewise, are in competition with each other for labour. As one authority on labour law has put it:

If such an inequality did govern the employment relationship, we should expect to see conditions that exist in no labour market. Wages would be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies the employee will be bound for a term while the employer ... retains the power to dismiss at will. Yet in practice we observe both positive wages and the right to quit at will. (Epstein R A, (1984), In Defense of the Contract at Will", *University of Chicago Law Review*, 51, p. 972.)

2.6 Thus, if the unequal bargaining position argument were true, it would have the following implications:

- holidays and leisure time in general would have been driven down internationally, whereas the trends have been in the opposite direction;
- the government should regulate not just holidays but all aspects of the employment contract; and
- it would apply just as much to the self-employed who deal with large firms as clients. The logic of this argument therefore is that self-employed people should also be obliged to have a set number of holidays.

2.7 It is also worth noting that the current arguments that deregulation of holidays will lead to employees being deprived of leave and leisure are identical to those made by unions at the time of the passing of the Employment Contracts Act. At that time the claim was that wages and other working conditions would be cut with deregulation. Experience has shown these arguments to be without foundation. The idea that only employers, and not employees, will have any choice about work or time of is equally fallacious.

2.8 The health and safety argument does not stand up to analysis for the following reasons:

- the number of days leave under consideration is dwarfed by the 104 days it is normal for employees to have as weekends or equivalent days off;
- this argument would require the law to prohibit employees to work over their leave. This in turn would require a definition of 'work'. It is evident that many people use their paid holidays to take a seasonal job, to attend to a business they run part time or to carry out jobs that would otherwise have to be paid for on their own or other peoples' property. Likewise, a person with two or more part-time jobs may simply be doing one while on paid leave from another; and
- legislation that is specially designed to protect the safety of workers, such as the Health and Safety in Employment Act 1992, already addresses this issue.

2.9 Opposition by trade unions to reform of holidays legislation is understandable.

The easiest form of negotiation is where the two parties are free to agree the overall terms for a job. Most people are capable of conducting such a negotiation on their own behalf. The more complex the statutory intervention, the more necessary it is to have professional negotiators. The real beneficiaries of government intervention in remuneration arrangements tend to be union officials not employees. As one source has put it:

It is not difficult, therefore, to understand why the number of hours worked ... is regulated and why that sort of regulation is strongly supported by labor unions. Unions in particular create their own, more restrictive ceilings which are embedded in a plethora of work rules promulgated by the union itself, made judicially enforceable in union-negotiated contracts, or achieved through political pressure in the form of local codes (Heldman, Dan C, Bennett, James T, Johnson, Manuel H, *Deregulating Labor Relations*, The Fisher Institute, 1981, p. 47)

Holidays legislation is now arguably the most complex area of New Zealand's labour law. It is therefore not surprising that unions seek to maintain the illusion that complex law is necessary to protect employees' interests.

2.10 The interests of firms, consumers and employees will all be harmed when there is reduced flexibility to negotiate over holidays. Firms may face higher costs as a result of inefficient working arrangements. Consumers, the employer's employer, may have to pay higher prices or miss out on goods and services which it is no longer profitable for firms to produce. Employees may not be able to obtain the working arrangements they prefer. Because firms in today's open capital markets must obtain returns which cover the costs of investors' capital, ultimately the costs of inefficient arrangements will be passed back to

workers in lower wages or reduced benefits. There seem no good grounds for damaging the interests of all parties in this way, and for interfering with the freedom of firms and workers to determine the arrangements that are most productive and convenient for them.

2.11 It is therefore questionable whether the government should concern itself with holidays at all. The only exception to this at the margin might be a small number of days a year when there is great popular demand for people in a family or group to be able to take the day off together. Even then, the efficacy of legislation is to be doubted. The tradition of taking Christmas off is very strong, but as the service sector expands it can be expected that the number of people working on Christmas Day will gradually increase. It is unlikely that the presence or absence of statutory protection for Christmas Day would significantly affect this process one way or the other.

3.0 ISSUES RAISED IN THE CONSULTATION PAPER

Should there be a separate Holidays Act?

3.1 If the government is to concern itself with holidays, this should be as part of an overall consideration of the government's labour market interventions. As pointed out earlier, a change in the standard working week could be of far more significance to an employee's leisure time than a change in the holidays legislation. For example, a reduction of the working week to four and a half days without an offsetting reduction in the rate of pay would be the equivalent of more than doubling paid leave entitlement to eight weeks per year. If holidays legislation is required at all, it should be considered in the context of the length of the working week and the minimum wage (which statutory holiday entitlements are equivalent to) and appear in one consolidated piece of legislation.

Should holidays be tradeable for cash?

3.2 It is evident that numbers of people already do trade holidays for cash by taking another job or by carrying out some task which they do not enjoy in order to avoid having to pay for it to be done. All that the legislation achieves, therefore, is to prevent people from negotiating with their main employer to trade holidays from that job for cash.

3.3 It should also be noted that individuals' preferences will change markedly according to their age and family circumstances. A recent study by Massey University showed that 30 percent of the workers surveyed would like to be able to work longer hours and earn more money. Young single people may well be willing to work six or seven days a week, including public holidays, for a period in order to save a deposit for a house or accrue sufficient leave to take a long trip overseas. They may therefore be willing to trade off leave for pay on a different basis from any specified in legislation. Parents with children will have other priorities, calling for more regular time off, and may demand a higher payment for having to work on holidays, especially at short notice. Depending on how the mandatory price for working on public holidays is calculated, the end result might well be that an employer demands work from the parent, who regards the pay level as barely sufficient to compensate for the inconvenience, rather than from the young person who would have happily worked for less.

3.4 Flexibility in holiday arrangements is therefore a benefit not just to employers but to employees who will have a variety of preferences. The paper on the other hand appears to assume that flexibility is a benefit only to employers and conflicts with 'fairness' to employees.

3.5 It is also proposed that the legislation should set minimum levels of compensation for bargaining away annual holidays. This is misconceived. If the statutory minimum price is too high it will lead to holidays not being worked, despite staff being ready and willing to work (as was clearly the case in the past in the restaurant trade). If the statutory price is too low, then it is a waste of time to go through the exercise of determining and setting it. No government agency has sufficient information to set an appropriate minimum price.

3.6 A review that went back to first principles would therefore start from the proposition that holiday arrangements should be a matter for negotiation between employer and employee. There is certainly no principle which suggests that employees should be entitled to three rather than two or four weeks holiday, or that they should be able to trade just one of those for cash rather than two or all.

Objectives of paid leave

3.7 Inevitably, interference with holiday arrangements requires some justification and the government has to propose 'objectives' for paid leave. To avoid undue interference with people's freedom to make their own arrangements these objectives have to be framed in terms so broad as to be meaningless.

3.8 The objective of annual holidays is said to be for "rest and recreational purposes". But the 15 days annual holidays are of marginal value for rest and recreation compared with the 104 normal days off in weekends and, as pointed out earlier, there is no way of knowing what people actually do on their leave. No figures are available in New Zealand on the uptake of annual leave. Surveys in other jurisdictions, however, suggest that a substantial percentage of annual leave entitlements is not taken up.

3.9 The objective of public holidays is said to be to "entitle employees to take leave to observe days of significance to the community". There must be some scepticism about the significance of all 11 public holidays. It would be interesting to know, for example, what proportion of the population could identify the original purpose of Labour Day, the level of church-going on Easter Sunday, or what republicans think about the Queen's birthday holiday. This 'objective' cannot sustain a case for more than a handful of holidays such as Christmas Day and Waitangi Day. It also does not explain why, when Christmas Day falls on a Saturday so that most people have the opportunity to observe it in the ordinary way, a public holiday is given on the Monday following (s 9 Holidays Act).

3.10 As the population becomes increasingly multi-ethnic and pluralistic, more practical concerns overtake some of the sentiments behind public holidays. It is common to hear the opinion expressed that the main school holiday should be in February rather than January as the weather is usually better and more settled then. At present, however, the arrangement of public holidays effectively forces teachers and parents of most school children to take their main holiday in January. The effect of the legislation may well be to enforce an arrangement that is sub-optimal from almost everyone's point of view. Waitangi Day then falls within days of the return to school. Public holidays which fall on days other than Mondays and Fridays are a source of irritation, cost and absenteeism to employers, families and schools.

3.11 In fact, a more convincing rationale for public holidays would be that there is some value in signalling certain days that large numbers can expect to take off, so that families can carry on activities together or major events can be held. If this were desired, it is not clear that statutory intervention is necessary: Christmas Day was observed long before there was a Holidays Act. There can be no objection, however, to the government providing such signalling so long as individuals are free to contract out of the arrangements without difficulty. But if this is the rationale for continuing with public holidays it implies:

- a recognition that a number of people will be at work on public holidays to provide services and entertainment for the remainder; and
- the dates and spacing of public holidays should be reconsidered.

Special leave

3.12 Special leave is best conceived of as a form of health insurance. Ostensibly it is insurance cover (up to the limit of days off) paid for by employers. In reality, in a competitive labour market this cost will be offset in the form of reductions in wages or other working conditions. This will leave many workers in a worse position than if they were free to determine their preferred trade-offs. It would be of interest to know how many employment contracts provide for sick leave above the statutory minimum. If the answer is not many, this would tend to suggest that the mandatory trade-off is not viewed favourably by most workers and is against their interest.

3.13 Like other prescribed forms of leave, mandatory provisions governing special leave are increasingly irrelevant in an environment in which employees are paid salaries rather than wages and work is assessed by outputs rather than inputs (such as hours of work). In a competitive, high-employment labour market, which will be fostered by a minimum of regulatory constraints, employers will have strong incentives to treat workers fairly, and to take a reasonable attitude towards time off for sickness or other contingencies such as bereavement involving close family members. At the same time there will be incentives, which are much weaker with statutory provisions, to see that such arrangements are not abused.

3.14 There is, therefore, no real reason for including any provision for special leave in employment legislation. The question of whether to provide sick leave, or to set up an insurance fund, or simply to pay employees a higher standard rate, should be one for negotiation between employees and employers. If special leave is to be provided for, it should be limited to sickness.

Principles underpinning holidays legislation

3.15 It is proposed that legislation will maintain the present core holiday entitlements. But these entitlements cannot be defended in general or in detail by reference to any principle. It is also stated that the coalition agreement requires that the industrial relations environment should be fair, flexible and neutral. But the remainder of the paper appears to assume that the

requirements of fairness and flexibility are opposed to one another. If this were true, no principle would be able to tell us what the correct balance was.

3.16 We comment as follows on the specific goals proposed in the paper for holidays legislation.

- *recognise the different objectives of the various kinds of leave.* These objectives have already been discussed. For most people, most of the time, one day off is the same as another.
- *clarity.* It is far from clear that the proposals in the paper will, of themselves, remove the sources of difficulty with the current legislation. These involve problems such as Christmas Day falling at a weekend. To some extent those difficulties follow inexorably from the attempt to legislate for time off.
- *universality.* The provisions are not universal. Employees are only a proportion of the population and the legislation only applies as intended to those employed full time by a single employer. No explanation is given for the government's intense interest in the holiday arrangements of this limited class of people.
- *simplicity.* This word is used to justify an attempt by the government to reduce transaction costs for contracting parties. However, transaction costs would only be reduced if it were assumed that no employer or employee ever considers having more holidays than the statutory entitlement. Even if it were true that there were transaction costs to be saved, the market would rapidly provide a standard form which would have the desired effect. The trade-off between transaction costs and the convenience of the parties concerned is clearly one that should be made by them and not by the government. This argument could be used - and indeed was used - to justify national pay awards with all the costs that they impose.
- *flexibility.* It is suggested that employees and employers will be able to determine the timing and amounts of leave which suit them. This point conflicts with the supposed elimination of transaction costs; it has also been pointed out that the current arrangements for public holidays often impose considerable inconvenience and cost.
- *fairness.* It is unclear why 'fairness' requires that the government intervenes in the weighting of different parts of the overall remuneration package. If, for example, the government were to ordain that all employers must provide all employees with company cars it would be obvious that the cost would have to be met by a reduction in wages. It cannot seriously be supposed that the same is not true of holidays. In particular, it would not be credible to maintain that a requirement to identify 6 percent of casual workers' pay as 'holiday pay' really grants them any increase in overall remuneration.

The consultation paper uses the word 'fairness' as meaning to "ensure that employees receive a minimum entitlement of paid time off work". 'Fairness' is better understood as a characteristic of a process (voluntary exchange) rather than an end-state outcome. To the authors of the paper, 'fairness' requires outcomes which they, or others who wield governmental authority, approve. Individual employees are likely to have their own notions of fairness - e.g. getting an attractive amount of compensation for giving up a holiday.

- *neutrality.* It appears to be assumed that an outcome could unduly favour one party or another. This is false. First, it assumes that industrial negotiations are a matter of confrontation and concession rather than the negotiation of a mutually beneficial arrangement. Secondly, it assumes that what is mandated in one part of the remuneration package will not be paid for by a reduction in another part.

The options

3.17 Our comments on the four options follow directly from the preceding discussion. Given that the review was supposed to consider matters from first principles rather than be involved only with fine-tuning, the options are presented in the wrong order and will be considered here in the more logical sequence.

3.18 Option V, the ability of employees to trade any or all holidays for cash, appears to be missing for no apparent reason. In our view it is the most desirable option if holidays legislation is considered necessary at all, which we doubt.

3.19 Option IV sets an arbitrary limit, incapable of any principled defence, of one week's leave which may be traded for cash. Where is Option IVA which allows two weeks to be traded? The comments under the heading "application of the principles" do not require further comment, for reasons apparent from the above discussion.

3.20 Option III does not allow public holidays to be traded for cash. This is baffling. The purpose of public holidays is said to be to allow the observance of days of significance to the community. If an employee has to work on one of those days it would seem to follow that the appropriate compensation would be in the form of money rather than a day off on a day of, presumably, less significance to the community.

3.21 Options II and I do not warrant any further comment.

3.22 There are said to be subsets of Options II and IV which allow only some public holidays to be traded for cash or for days in lieu. This cannot mean what it says. There are large numbers of employees who have to work on public holidays come what may.

What is missing from the Consultation Paper

3.23 There is no concrete discussion of any of the litigation over the Holidays Act and how it is proposed to deal with the problems that it has created. These cases have often related to the question of flexibility in that they have concerned the terms on which staff work on public holidays, or the manner in which they are paid for notional holidays. In particular, the following matters clearly remain for consideration:

- the role of 'holiday pay' and why it is necessary to itemise this part of wages: *Carter v C Brown Developments Ltd*; *Drake Personnel (NZ) Ltd v Taylor*; and
- non-standard situations such as being required to be 'on call' on a public holiday: *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd*.

The detailed level of discussion in these and other cases is itself an indication that the law should not be concerned with such matters, but rather that they should be left to contracting parties to determine. The blunt reality is that if employment law is complex and costly, for small and large employers alike, the level of income and employment in the economy will be affected. At a time when judicial rulings have greatly increased the complexity of employment law in New Zealand and when unemployment is rising from a still high level, it is imperative that the government takes vigorous action to reduce the costs and risks of employment contracting if it wishes to lower unemployment.

3.24 It is noteworthy that the consultation paper presents no analysis of the operation of competitive labour markets and hence the principles that should guide labour market interventions. Accordingly no framework emerges against which interventions over holiday arrangements can be judged. It is almost as though the body of analysis on which the Employment Contracts Act was based has been forgotten.

4.0 CONCLUSIONS

4.1 The Consultation Paper is not a comprehensive review of the Holidays Act, but only an attempt at fine tuning.

4.2 If the sole result of this review is that employees are able to bargain over one third of their annual leave and over their public holidays (as they used to be able to do in the latter case) then the review is itself an example of the waste of resources that follows from unnecessary government intervention in the labour market. The cost of this review would have been better devoted to tax or debt reduction.

4.3 The grounds for any prescriptive law governing holidays is weak. With rising incomes people are likely to continue to opt for increased leisure rather than paid work regardless of legislation. There is no evidence that the removal of statutory provisions governing holidays would greatly alter the current standard holiday arrangements - certainly union arguments that holiday entitlements would be 'slashed' have no more credibility than their former arguments that deregulation of wage setting would mean wages would be 'slashed'. What could be expected with deregulation, however, would be a greater variation in holiday arrangements, including trade-offs between pay and leave, as firms and employees worked out the combinations that suited them best.

4.4 With the world's richest and most productive economy, the United States, having no statutory provisions at all governing annual leave or the terms of employment relating to public holidays, it is clear that full deregulation is a perfectly reasonable and feasible option. In our view it is the most efficient and fair solution. If the government is to have any role at all with regard to holidays, it should be limited to stating what the entitlements are (i.e. determining who has what property rights) and then allowing individual employees and employers to negotiate whatever exchanges they like. There should be no constraints (e.g. prescribed minimum rates of pay) on the terms of those exchanges.

Our recommendations on holidays legislation, in order of preference, are therefore as follows:

- The Holidays Act should simply be repealed. This would leave parties free to negotiate employment contracts reflecting their own preferences for work, pay and leisure. Observance of holidays such as Christmas and New Year, which are still widely recognised, would be a matter for people to decide for themselves.

- If this option is not favoured, the government should limit its involvement to specifying existing holiday entitlements (public holidays - or those of most significance - annual leave, and special leave). People should be free to contract out of such arrangements and no restrictions should be placed on the terms of such contracting out.
- If unrestricted opting-out is not favoured, any restrictions should be kept to a minimum.
- There is no need for separate legislation governing this aspect of the employment relationship. Any statutory provisions on holidays (and related matters) should form part of the Employment Contracts Act.